The Law of the Motion Picture Industry

A Lecture Delivered by

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NOTE.

In printing this lecture, the author wishes to take this opportunity to express his appreciation of the kindliness and scholarship of the Honorable George W. Wickersham, former Attorney General of the United States, whose great abilities and sound legal standards were always a beacon in the first and early days of the discussion of the law of the motion picture industry.

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Our justification for discussing the law of the motion picture industry is that there has come into the civilized world in the past ten years a medium of expression as revolutionary and important in its way as the printing-press, the telegraph and the flying machine; and, whereas these three inventions went through years of development and improvement, the motion picture seems to have sprung, Minerva-like, full born on the public, with the consequence that there is much confusion as to the rights of the public and those engaged in the industry; and a general hurry and bustle among certain active and honest souls to put some laws on the statute books without due consideration as to the real necessity for those laws.

As with Gulliver when he arrived in Lilliputia, the first thought seems to have been to tie up the industry with laws, a tendency which I might say characterizes our day, and which tends to legislation as a substitute for thought. No one regrets this more than the clear-seeing lawyer, who realizes that the attempt to cure gastronomic ills by fiat of government, while appealing to the fiery imagination of the man on the street, tends to undermine the respect of the community for all laws, and what is more, it doesn't cure the dyspeptic.

An interesting analogy might be drawn between the introduction of the motion picture in our day and the introduction of playing-cards into Europe in the thirteenth century. Playing-cards, as we all know, were invented in the East and were founded on the game of chess, known as the Four Kings. When they were introduced into Europe they

became so popular with the people that various German towns passed ordinances, between the years 1400 and 1438, forbidding their use by the people. In 1440, however, a concession was made, allowing the people to use playing-cards on holidays. In England, Parliament passed a law forbidding their use by common people except on holidays. In other words, the fact that the people had found something that amused them was a sign that they had been lured away from virtue by the devil.

In view of the confusion of public mind, haste of legislative body and hurried decisions by the courts that have followed the rise of the motion picture industry, it seems but right that we should take a survey of what is the law, as it is being applied to this new industry, and what relation that law has to the fundamental laws and principles, without which there cannot be built any superstructure that would seek to take care of new conditions.

What is a motion picture? Professor Hugo Munsterberg said: "The massive outer world has lost its weight; it has been freed from place, time and casuality and it has been clothed in the forms of our own consciousness. The mind has triumphed over matter and the pictures reel on with the ease of musical tones. It is a superb enjoyment which no other art can furnish us."

Coming at a time when the cost of most amusement was high, the motion picture was at first a plaything, but it is now accepted as one of the large factors in the history of our day, with educational and scientific possibilities that had not been dreamed of. Every day at least ten million people in the United States go to make up the largest audience and the largest record of audiences that the world has ever known.

In a previous lecture, Judge Charles M. Hough, an able jurist, told you that Commercial Law is composed of customs of merchants, grafted on the customary law of agricultural and pastoral people—the crystallized rules of many generations of trades—all of which is finally accepted by the courts as general law. He told you, too, that William

Murray, Lord Mansfield, stated most of this law, formulated a system of jurisprudence which was suited to the English-speaking people, and by his intellectual force secured its acceptance approximately one hundred and fifty years ago.

But whereas the Commercial Law is the outgrowth of centuries—we find even the beginnings of this law in the Code of Hammurabi, dug up in Babylon, and evident in the customs that were accepted even then, 2250 B. C.—the law we are to discuss to-night relates to an industry that has come suddenly on the world within the last ten years; but however short the time has been for the law of this industry to develop, its growth has been rapid; and while to-day the law may not be quite settled, it nevertheless has passed its formative period. Perhaps—who knows?—there may be a Lord Mansfield in this audience who will so shape the law, and with such understanding, that the controversies that are agitating us to-day will be very much things of the past in another generation.

Touching as the law of this new industry does so many phases of the general law, we cannot in such a discussion as we are having to-night expect to do more than bring out the high lights, and first it may be necessary to go into the general subject of patents, which at the very outset brought into the courts those engaged in the motion picture industry.

PATENTS.

The patent phase of the new business produced in the first years of its development a number of decisions which were very important at the time, but now have practically little interest except to the student, because most of those patents have expired; in fact, the basic patent has been declared invalid by the courts.

Ask the average person who is the inventor of motion pictures and the reply will be, Thomas A. Edison. Mr. Edison himself would probably agree that he is the inventor, but the courts have held otherwise. His claim was asserted

under what is known as the "Edison Film Patent," but was rejected by our courts as being untenable.*

In one of the cases, Judge Wallace disposed of Mr. Edison's claim that he was the inventor of the art of taking still objects and projecting them as moving pictures, or objects in motion; for, after all, you must understand that "moving" pictures do not move. What is seen on the screen is an optical illusion; the eye is led to believe that the objects are in motion, whereas, in fact, it is the camera and projecting machine which make them appear to move.

In order to thoroughly understand these decisions, we are obliged to make reference to what motion pictures are and the appurtenances for a motion picture exhibition. They are, first; the camera with which the pictures are taken; second, the projecting machine with which the film is projected upon the screen; third, the screen.

The early stages of the industry, although dating back several years prior to 1907, really begin at that period when the demand for pictures in this country first became marked. The result of this demand was that there came upon the market the productions of about ten American manufacturers, all but one or two of whom were manufacturing their own product, and a few who were importing films from abroad. There were at that time a number of outstanding patents upon parts of the camera, as well as upon the strip film, already referred to as the Edison Film Patent, and patents upon the component parts of the projecting machine.

The business at that time was conducted in defiance of, or at least in disregard of, the existing patents. The market was comparatively open and free until the Spring of 1908, when the manufacturers divided into rival factions, one known as the Edison group, who sought protection under the Edison Film Patent and patents upon the parts of the camera; the other, the so-called Biograph group, who sought protection under patents upon the parts of the projecting machine.

*See the decision of Mr. Justice Wallace in Edison v. The American Mutascope Company, 114 Fed. Rep. 926. See also Edison v. American Mutascope & Biograph Company, 151 Fed. Rep. 767, and Motion Picture Patent Company v. Chicago Film Exchange, 30 Appeal Cases, District of Columbia, p. 285.

FORMATION OF COMBINATION.

The Edison group formed a combination of manufacturers, and licenses were issued under the so-called Edison Film Patent, and the Biograph Company, with their group, formed a combination under the projecting machine patents. They immediately started litigation under the patents, each side seeking to restrain the other. The Edison people were asserting the invalidity of the projecting machine patents and belittling the patents on the machine, and the Biograph group were likewise belittling the Edison patents.

This continued until about the early Fall of 1908, when the factions came together, and all patents were brought into a holding company, called the Motion Picture Patents Company, and a new system was devised, which was thereafter condemned by the Federal Court at the suit of the Government, as being a combination in restraint of trade under the Federal Anti-Monopoly Act.*

After all the patents had been assigned to the Motion Picture Patents Company, a complicated system of licensing under the patents was devised, with license agreements to the manufacturers, who were known as the "Licensed Manufacturers." These manufacturers did business with the rental companies, or middlemen, who were obliged to agree that they could deal only wtih theatres or exhibitors who recognized the validity of the patents, and who would bind themselves to use exclusively the products of the Licensed Manufacturers.

With the Eastman Kodak Company an agreement was made that the entire output of the raw stock, or base film, upon which the pictures were printed should be supplied by the said Eastman Kodak Company only to the manufacturers in the combination, excepting about three per cent. of the output, which the Eastman Company was permitted to distribute for scientific, educational and governmental purposes. With the market in this condition, it may readily be understood that competition was completely shut off.

*See United States v. Motion Picture Patents Co., opinion of Dickinson, J., District Court of the United States for the Eastern District of Pennsylvania, 225 Fed. Rep., p. 800.

COMBINATION DECLARED ILLEGAL.

The final step in the combination, as found by the courts, was that after the manufacturers had succeeded in gathering in the rental companies and tying up the exhibitors, they formed a sole selling agency of the Licensed Manufacturers, known as the General Film Company. This company proceeded to, and did, successfully, absorb or put out of business all of the then existing rental companies, with the exception of Mr. William Fox's Company, whose resistance to the exactions and demands of the Motion Picture Patents Company and Licensed Manufacturers led to the suit under the Federal Anti-Trust Law by the Government for the dissolution of the combination. This suit resulted in the decision of Mr. Justice Dickinson, granting judgment in favor of the United States Government, already referred to.

To those who are interested in this subject, a reference will be found to the activities of the General Film Company in the report of Judge Clayton, as Chairman of the Committee on Judiciary of the United States Senate, in vol. 2, p. 1,964, of the report of the hearings before that Committee in the Sixty-third Congress, second session, where he, speaking for the Committee, said:

"Where the concern making these contracts (the 'tying contract') is already great and powerful, such as the United Shoe Machinery Company, the American Tobacco Company and the General Film Company, an exclusive or tying contract, made with local dealers, becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system of practice. By this method and practice the Shoe Machinery Company has built up a monopoly that owns and controls the entire output of machinery now being used by all great shoe manufacturing houses of the United States. No independent manufacturer of shoe machines has the slightest opportunity to build up any considerable trade in this country while this condition obtains. If a manufacturer who has shoe machines of the Shoe Machinery Company were to furnish and place a machine manufactured by any independent company in his establishment, the Shoe Machinery Company can, under its contracts, withdraw all of their machinery from the establishment of the shoe manufacturer and thereby wreck the business of the manufacturer.

"The General Film Company, by the same method practiced by the Shoe Machinery Company, under the lease system, has practically destroyed all competition and acquired a virtual monopoly of all films manufactured and sold in the United States. When we consider the contracts of sale made under this system, the result to the consumer, the general public and the local dealers and his business, it is even worse than under the lease system."

As a result of this report, several provisions were inserted in the Clayton Law, which amended the Sherman Anti-Monopoly Law, providing as follows:

"Sec. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption or resale within the United States or any territory thereof, or the District of Columbia, or any insular possessions, or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce; *Provided,* That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality or quantity of any commodity sold, or that makes only due consideration for difference in the cost of selling or transporting, or discrimination in price in the same or different communities, made in good faith to meet competition; *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.

"Sec. 2. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any territory thereof, of the District of Columbia, or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor, or competitors of the lessor or sellor, where the effect of such lease, sale or contract for sale, or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

This enactment was the result of a hearing devoted by the Judiciary Committee of the Senate to the subject of motion pictures, and for a full discussion reference may be made to the address of your lecturer before that Committee, which will be found in the volume containing hearings before the sub-committees of the Committee of the Judiciary of the United States during the Sixty-first and Sixty-second Congress, vol. 1, pp. 470 to 502.*

*See also Mr. Rogers' letter to President Wilson of July 27, 1914, incorporated in the speech of Senator Crawford, reported in the Congressional Record of July 30, 1914, at p. 14,145.

The result of the filing of the petition by the Government in the anti-trust suit, and particularly since the decision of the court, announced in November, 1915, has been that the market was opened and competition was restored, so that now it may be said that the opportunity for competition is fairly free.

This result, however, was not accomplished until there had been a very interesting clash of judicial opinion on the question of the right of individuals, working in combination, to refuse to continue trade relations with another individual in furtherance of a conspiracy to monopolize trade.

Professor Charles T. Terry, in a lecture before this College, called your attention to the fact that the law would not compel a man to deal with another in contractual form, whether his refusal to deal with the other in the absence of contractual rights was for any cause or no cause.

When this question came before Mr. Justice Learned Hand,* whose legal acumen and ability is acknowledged, he said in part:

"I am by no means willing to agree that if ten manufacturers agree together to monopolize the function of middlemen, and in pursuance of that agreement they discontinue selling to existing middlemen and so ruin them, the middlemen have no relief. It is very well to say that each manufacturer may refuse to sell to whom he chooses, and so he may, but his right not to sell is not necessarily so absolute that he can use it as a means of effectuating an illegal purpose."

"That an act is one of a series forbidden as a whole, is an incident often very relevant legally. If it were not we should never have the element of intent in crime or torts."

The *contra* was held by the Circuit Court of Appeals, reversing Mr. Justice Hand, the opinion being written by Mr. Justice Lacombe, as follows:

"It is asserted by defendant-appellant that at no time prior to the institution of this suit was there any contract between it and the complainant, whereby it had agreed to continue to supply complainant with films of its manufacture for any period of time. We find nothing in the record to indicate that there was any such contract, and we do not understand that complainant contends that there was.

*The Greater New York Film Rental Company v. The Biograph Company, et al., decided July 12, 1912.

"This being so, we are satisfied that if all the facts averred in the bill were proved at final hearing, and all the inferences of fact which complainant contends for were drawn from the facts thus proved, and that if upon some theory or other of those suggested it were held by the trial court that complainant had suffered wrong at the hands of those whom it alleges conspired to injure its business, and that for such wrong it was entitled to some relief against the conspirators, or some of them, it could not obtain specific relief of the sort accorded by this preliminary injunction, viz., a decree compelling the Biograph Company to sell films to complainant against that company's wish." (203 Fed. Rep., p. 40.)

With the highest respect for the Circuit Court of Appeals in this District and the Judges who compose it, I believe that the view of Judge Hand is the correct one. The view of Mr. Justice Lacombe is that with the exception of a public service corporation, or a company engaged in public utilities, one cannot be compelled to have or maintain trade relations with another. To subscribe to this view would, in short, be saying that a conspiracy can be successfully carried on, using so-called lawful means, i. e., the right to refuse to contract, for the accomplishment of an unlawful end or purpose, the ruining of a competitor by the persons so combining to refuse to deal with him.

This theory does violence to the generally accepted doctrine that a rightful means cannot be used for the purpose of accomplishing a wrongful end. There is abundant authority in the books to sustain this proposition. Those who are interested in the further pursuit of this inquiry will find an expression of it in the opinion of Mr. Justice Dickinson, already referred to (203 Fed. Rep., p. 39), in which he says in part:

"The conspiracy under this statute, i. e., the Federal Anti-Monopoly Act, as at common law, may have as an element the seeking of an unlawful end or the employment of unlawful means."

It was also decided in the same case that the fact that the Patents Company, or the manufacturers, were the owners of patents upon the camera, or parts thereof, upon the projecting machine, or parts thereof, or in fact upon the film itself, was no defense to an unlawful conspiracy or a monopoly creating a restraint of trade. Judge Dickinson

stated that the ownership of patents cannot be accepted as a defense to the charge of unlawful combination.*

The defendants, failing to succeed in their contention in the Government litigation, that their patents, or alleged patents, afforded them justification for what would otherwise be unlawful, made the novel suggestion that motion pictures as such were not articles in common use and that they were not the subject of interstate commerce.

The manufacturers asserted that "photo-plays" were artistic productions "emanating from the brain of the author," and the "artistic development" of the story by living actors. Therefore, they argued, it was not a motion picture film, but in reality the artistic creation, imagination and development of an author's brain, supplemented by the acting ability of the principals engaged in the performance that was the subject matter in dispute.

To understand the importance of this we need only have reference to the fact that the Federal statue was inended to deal with articles sent into the channels of interstate commerce, and that the Anti-Monopoly or Trust Act of the State of New York, familiarly called the Donnelly Anti-Trust Law, (the author of which is Mr. Justice Donnelly, of our Supreme Court), which act is now known as Section 340 of the General Business Law, formerly Chapter 690 of the Laws of 1899, is intended to cover articles in common use dealt in intrastate commerce.

The claim made by these defendants found its original justification in the decision of Mr. Justice Rosalsky, of the

*See also Bement v. National Harrow Co., 186 U. S., 70.
Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 154 Fed. Rep., 358.
Indiana Manufacturing Co. v. J. I. Case Machine Co., 154 Fed. Rep., 365.
Goshen Rubber Works v. Single Tube Auto & Bicycle Tire Co., 166 Fed. Rep., 431.
Bauer v. O'Donnell, 229 U. S., 1.
United Shoe Machinery Co. v. La Chatelle, 212 Mass., 467, pp. 480 and 481.
Henry v. Dick Co., 224 U. S., 1, dissenting opinion of Ch. J. White.
Virtue v. Creamery Package Mfg. Co. and ano., 227 U. S., 6.
Blount Manufacturing Co. v. Yale & Towne Manufacturing Co., 166 Fed. Rep., 555.
Waltham Watch Co. v. Keene, 202 Fed. Rep., 225.
U. S. v. New Departure Manufacturing Co., 204 Fed. Rep., 107, 114.
International Harvester Co. v. Missouri, 234 U. S., 199, 209.
U. S. v. International Harvester Co., 214 Fed. Rep., 987.
Broomer v. McQuenan, 14 How. (U. S.), 539, 548.
Patterson v. Kentucky, 97 U. S., 501.
Webber v. Virginia, 103 U. S., 344, 347.
National Harrow Co. v. Hench, 83 Fed. Rep., 36.
National Harrow Co. v. Hench, 84 Fed. Rep., 226.
National Harrow Co. v. Hench, 76 Fed. Rep., 667, 669.

Court of General Sessions in a proceeding by The People directed against the so-called "Theatrical Trust," for violating our State Anti-Trust Law; and in a very complete and thorough opinion* Judge Rosalsky disposed of the contention by holding that plays and dramas were not, under our State statute, articles or commodities of common use, and that, however oppressive, the acts of the alleged combination did not come within the definition of our law, and that, therefore, the defendants had not violated the statute.

This was followed by the decision of Mr. Justice Pendleton, which was affirmed by our Appellate Division, in an action against Mr. Hammerstein by the Directors of the Metropolitan Opera House,† under a contract he had made with them, in which he asserted that the acts of the managers of the Metropolitan Opera House were a violation of the Federal Anti-Trust Law, a claim which Mr. Justice Pendleton denied, saying, with respect to the opera, that although the troupe would move from one state to another, carrying scenery and stage appurtenances, that they were not engaged in interstate commerce. But, whatever the situation may be with respect to theatricals, or to the opera, the claim made by the defendants was rejected by Judge Dickinson. In his opinion he entirely ignored the claim. But the contention, if at all arguable, was effectually disposed of in the illuminating brief submitted by Mr. Edwin P. Grosvenor, Assistant United States Attorney General.

In this connection we may briefly refer to a case before Judge Hough, of our Federal Court in this District—always a reliable authority—in which, in determining the relation of a photo-play to the drama, it was held in Kalem Company v. Harper Brothers, 222 U. S., 55, that:

"An exhibition of a series of photographs, of persons and things arranged on films as moving pictures, and so depicting the principal scenes of an author's work as to tell the story, is a dramatization of such work, and the person producing such films and offering them for sale, or exhibition, even if not himself exhibiting them, infringes the copyright of the author."‡

*People v. Klaw, 55 Misc. Rep., p. 75.
†162 A. D., 691.
‡Revised Stat., Sec. 4,952, as amended by Act of March 3, 1891, Chap. 565; 26 Stat., Sec., 1,106.

The court ruled that the copyright upon the late General Lou Wallace's book, "Ben Hur," was infringed by portraying the story upon the motion picture screen. This was the first case that came into the United States Supreme Court upon this proposition. The court in disposing of the case said:*

"It is said that pictures of scenes in a novel may be made and exhibited without infringing the copyright and that they may be copyrighted themselves * * * *. Whether this concession is correct or not, in view of the fact that they are photographs and a lawful dramatization of the novel, we need not decide. We will assume that it is. But it does not follow that the use of motion does not infringe the author's rights. The most innocent objects, such as the mirror * * * *, may be used for unlawful purposes, and if, as we have tried to show, moving pictures may be used for dramatizing the novel, when a photograph is used in that way they are used to infringe a right which the statute reserves."

What the court had reference to with respect to the mirror illustration was its statement at Page 61 of the same case. The court said:

"But if a pantomime of Ben Hur would be a dramatization of Ben Hur, it would be none the less so if it was reflected by mirrors and not by direct vision of the pictures, as sometimes has been done in order to produce ghostly or inexplicable effects. The essence of the matter * * * * is not the mechanical mechanism employed, but that we see the event, or story, lived. The moving pictures are only less vivid than reflections from a mirror. With the former as with the latter, our visual impression—what we see—is caused by the real pantomime or reel men through the medium of mechanical forces, and that the machinery is different and more complex. How it would be if the illusion of men were produced from paintings instead of from photographs of the real things, may be left open until the question shall arise."

It may therefore seem that the question has not been definitely determined as to whether a photo-play is really "a commodity" or whether as such it comes under the jurisdiction of the Federal Anti-Monopoly Law. I am, however, of the opinion that whenever it will become important to effectually dispose of the question, that it will be found that there is no difference between the photo-play and the celluloid record which is used upon the phonograph, or the picture postal-card. For, after all, what is sent in commerce is a strip, or strips, of film, contained in rolls of approximately a thousand feet each. On these are still photographs that are commercially useful when put into a projecting machine and ground out to portray the story on the screen,

*Page 62 (222 U. S.)

in the same manner as the phonograph record is put upon the machine for the purpose of reproducing the musical sounds or matter contained on the record.

Or, perhaps, using the analogy of a book or novel. What is sent in commerce is really not the author's imagination, or the result of his brain work, but a number of pages bound together for the purpose of commercial sale of an article of commerce; to wit, a book, and upon this proposition the courts have already held that a book, or set of books, even though copyrighted, may be the subject of a monopoly, or combination, in restraint of trade, and that it is no answer to the prosecution under the Anti-Monopoly Law to say that books are copyrighted.*

Much of what here has been said is important only as giving a brief historical review of the industry. It relates largely to the patent phases of the situation and the rights asserted under the patents. We will refer now to another situation.

RESTRICTION OF USE OF FILM ILLEGAL.

There is now pending and undetermined in the Supreme Court of the United States an action entitled "Motion Picture Patents Company, petitioner, v. The Universal Film Manufacturing Company, and others, defendants," for a review of a decision of the United States Circuit Court of Appeals for the Second Circuit, reported in 235 Fed. Rep., p. 398, decided June 15, 1916, which affirmed the decision of Judge Hough in the same case, dismissing a bill in equity filed by the Patents Company, who had claimed that there was an infringement of the patent on a part of the projecting machine in using thereon motion picture film other than that designated by the patentee.

The Patents Company, in taking over a patent known as the Latham Loop Patent, had agreed that any projecting machine containing the Loop Patent was to be sold under an agreement that the purchaser of the machine would only use it to show picture film designated as Reissue Patent No.

*See Straus v. American Publishers Association 231 U. S., 222, reversing the same case in our Court of Appeals, 193 N. Y., 496.

12,192; that is, the Edison Film Patent. The petitioner asserted that the owner of the machine had exhibited on same film other than that designated by the Patents Company. This condition was held to be violative of the Federal Anti-Trust Statute and therefore unenforcible, the court refusing to follow the opinion in the so-called "Mimeograph Case" of Dick v. Henry, 224 U. S., 1, and asserting that under the doctrine of Bauer v. O'Donnell, 229 U. S., 1 (The Sanatogen Case), the manufacturer of the machine could not control the use of the machine after a sale thereof, any more than the owner of a patented article could fix the price thereon after he had licensed the manufacturer thereof to make and sell it and put the article into commerce.*

In the original opinion of the Circuit Court of Appeals, Mr. Justice Augustus M. Hand discussed the decision relating to the phonograph and Victor Talking Machine† which is now upon appeal to the United States Supreme Court.

If the Supreme Court of the United States should sustain the decision of our Circuit Court of Appeals, it will be the settled law that owners of patents upon parts of the projecting machine cannot designate what film may or may not be used upon the projecting machine, and that the purchaser thereof, having bought and paid for the machine, may use upon it such film as he may see fit to use.

Apropos of the patent phase of the question, a point was argued on behalf of the United States in the Government suit, to the effect that while the negative of the film may or may not be subject to a patent, the positive print, that which is commercially used, is not covered by the patent. The argument to support this was based on the claims made in the patent. Judge Wallace, in his opinion already referred to, said:

"The patent in suit pertains merely to that branch of the art which consists of the production of suitable *negatives*."

*See the decision of the Circuit Court of Appeals in the same case on a petition for rehearing, which was decided on August 4, 1916, and reported in 235 Fed. Rep., p. 401.

†See Victor Talking Machine Company v. Strauss, 230 Fed. Rep., 449.

And later, in the same opinion, he said:

"He (Mr. Edison) was not the first inventor of apparatus capable of producing suitable negatives."

At no place in the patent claims, said the counsel for the Government, is there any reference to the positive print. The description is only of the negative film. Hence he argued that there was a similarity between the production of the positive films from the print made from the negative and the use of the so-called "arrot" dredger used in the manufacture of enamel-ware, which was the subject of investigation by the United States Supreme Court in the Bathtub Trust suit. Concerning this Mr. Justice Dickinson said in his opinion:

"As a conclusion to the whole discussion, we deem the bath-tub case to be decisive of the principle contended for by the United States * * * *. We would feel constrained, on the authority of this case alone to find that the agreements and acts of the defendants in the present case went far beyond what was necessary to protect the use of the patents. * * *"

In this discussion of monopoly, patents and copyright, we are in a legal way establishing our industry, or in other words, showing that it is entitled to be treated equally with other industries. Through these decisions we know now that the industry has the same rights as other industries, and despite its more or less vagabondish beginnings, money invested in it, time devoted to it and the persons engaged in it, are entitled to the same protection as those engaged in other industries.

PREJUDICE AGAINST MOTION PICTURE EXHIBITIONS.

For, and this is a point that in discussing the new law, a law for this new industry, we are very apt to forget: That the moving picture industry does not come into court in the beginning entirely free of that historical prejudice that all Anglo-Saxon law has had for generations regarding anything pertaining to the theatre.

The Anglo-Saxon law was derived from the Roman law, and the Romans, under the Greek influence, where the actor was a person of distinction, regarded the theatre as their noblest institution. Yet the Anglo-Saxons wrote into their statutes this provision, passed by the House of Parliament in 1597:

"All persons that be, or offer themselves to be proctors, patent gatherers, or collectors for gaols, prisons, or hospitals, or fencers, bearwards, common players of interludes, or minstrels wandering abroad (other than players of interludes belonging to any baron of this realm, or any other person of greater degree, to be authorized to play under the hand and seal of such baron or personage), all jugglers, tinkers, pedlars and petty chapmen wandering abroad, etc., shall be adjudged and deemed rogues, vagabonds and sturdy beggars and punished as such."

Strange as it may seem, that law is still on the statute books of England, and while it is no longer operative, the feeling that the actor's was not a regular business did not disappear in England until a great innovation was undertaken, not through the passing of any statute or act of Parliament, but through the knighting of an actor, Henry Irving.

It is prejudice such as this against the actor showing itself in everything connected with the theatre, that goes sometimes to confuse those who have not fully grasped the fundamental principles of law, and who have not felt to the full what Walter Pater calls "the aesthetic charm of clear thought." It was nothing more than prejudice that for years blocked the Workmen's Compensation Act; it was prejudice that declared you could not regulate the hours of labor, and recently we have seen a "revolutionary" constitutional amendment adopted, after a hundred years accession to the Federalist prejudice against popular election of Senators, on the ground that the common people should not be trusted too much with a voice in their government.

Our new industry is now properly open to all who have the money to invest, with this difference: That here again the old-time prejudice is found, born of the primitive conditions and the religious prejudice that attended the first years and the incubating period of the modern theatre in England. As in every industry where the profits are apparently large and the opportunity for unfair dealing is lucrative, the unscrupulous endeavored to assume unto themselves the profits which justly belonged to another. This brings us to a consideration of the subject of unfair competition.

UNFAIR COMPETITION.

Under this may be included the violation of an author's or producer's copyright, to which some reference has al-

ready been made, or the simulating or pirating of a popular photo-play, or scenario, to which I have briefly alluded.

In this connection I call attention to the fact that mere similarity of title, or of theme, or theory, is not of itself violative of the author's or producer's rights, even though he be first in the field.

As in the matter of trade names, the rule is that the use of similar trade names cannot be enjoined, unless fanciful and original. Thus, if a man were to use the name "American Girl," or "Merry Christmas," or "Bohemian," to designate the name of his company, or motion picture corporation, these names, not being fanciful or original, could not be subject to be restrained.*

It has been held to be unfair dealing for a photo-play company to grant to another exclusive right to produce moving picture films and thereafter to grant a right to another to exhibit them.†

When the author has given a contract to another for the exclusive right to produce a play, it is a violation of his contract to permit another to produce his play by moving pictures, and this is true although the contracting parties did not contemplate a moving picture production of the play, because then impossible.‡

In this connection a claim was made that since the contract for the production of the drama on the stage with living actors, provided it was to be shown only in first-class theatres and in a first-class manner, the parties did not contemplate that the author reserve to himself the right to produce it in a second-class theatre or in a second-class manner. In the light of the large production of motion picture plays, such as "Intolerance," "Birth of a Nation," "Civilization," "A Daughter of the Gods," etc., in the first-class theatres in New York, such a reservation would not be regarded but as humorous.

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*Wolff Brothers Company v. Hamilton Shoe Company, 165 Fed. Rep., 413; Writ of Certiorari denied, 241 U. S., 215.
Florence Manufacturing Company v. Dowd, 178 Fed. Rep., 73; reversing S. C., 171 Fed. Rep., 122.
American Brewing Company v. Bienville Brewery, 153 Fed. Rep., 615.

†Lasky Feature Play Company v. Celebrated Players Film Company, 214 Fed. Rep., 861.

‡See Frohman v. Fitch, 164 A. D., 231.

TRADE MARKS.

Each country of course has its own trade mark law and they differ materially from each other. Frequently the trade mark or name is a valuable asset. For this reason they are frequently registered as such. In the South American countries there has been much confusion as to trade names and trade marks of film companies, for it seems there that the first user gets the right, no matter how extensively and favorably the name may be known in other countries. An illustration of South American law on the subject of registration is that of Ecuador. The office of registration is known as the Ministrode Asciendo Quito. The registration is for twenty years, but it may be renewed for periods of fifteen years. There are stipulated fees for original registration and renewal. The right to the trade mark is vested in the individual first registering it and no legal proceedings can be instituted before registration of the trade mark to prevent actual or intended infringement. This is substantially the law in Argentine, Brazil, Paraguay, Uruguay and Peru.

COPYRIGHT LAW.

The Copyright Law finds its origin in the Federal Constitution, which provides as follows:

"Art. 1, sec. 8, subd. 8.

"To promote the Progress of Science and Useful Arts, by securing for limited times to Authors and Inventors the exclusive right to their respective writings and discoveries."

Congress, in pursuance of this power conferred by the Constitution, has devised the copyright laws. Therefore, most of the cases to which we will refer are those containing the expression of the Federal Court upon the subject; but there will, of course, be found authorities in the state courts covering the copyright phase, which pronouncements of state courts are not based upon or under the copyright law, but because of the copyright law.

Of course, copyright of the motion picture was not provided for by the original copyright statute, and it was not until the year 1909 that the Federal courts recognized that on account of the growth of this industry that copyright

laws were necessary. Accordingly, the copyright statute was amended to include motion pictures.*

It was the amendment of August 24, 1912, that first gave motion picture plays a place in the Copyright Law, but before that time, by a decision in Edison v. Lubin, 122 Fed. Rep., p. 240, it was adjudicated that motion pictures were copyrightable under the law as photographs.

In construing the word "author," under section 2 of the Copyright Law, the Federal Court, in Gaumont v. Hatch, 208 Fed. Rep., p. 378, held that the person or company who produced a photo-play was an author within the meaning of the copyright statute.

I have already called attention to the fact that the United States Supreme Court has held that for the purpose of the Copyright Law motion picture photo-plays are considered dramas.†

The title of a motion picture play as such cannot be copyrighted. There is abundant authority which sustains this proposition with respect to motion picture plays, or scenarios.‡

What may be copyrighted is the story, or as it is called in the trade, the scenario, and this copyright protects the story the same as a copyright upon a play or a book, but it does not protect an author from attack, or give him a monopoly upon a theme or a subject which is not original to the play or story itself. For instance, in a case that was before the courts, where the play or story was written around the subject of the theory of "destiny;" the mere fact that an author conceived the idea of writing a play concerning destiny did not give him the exclusive right, because he had a copyright, over another person who later also conceived the idea of a story based upon destiny. The reason for this, as

*See Copyright Act of March 4, 1909, as amended by the Act of August 24, 1912, Section 4.

†Harper Brothers v. Kalem Company, 222 U. S., p. 55.

‡Selig Polyscope Co. v. Unicorn Film Service Corp., affecting the title of "The Rosary"; opinion by Mr. Justice Cohalan, N. Y. Sup. Ct., reported in Law Journal of September 16, 1916, at p. 1,856.

Harper v. Raynolds, 67 Fed. Rep., 904, 905, affecting the right to the story "Trilby."

stated by the court, is that the theme, or theory, was outside of the play.*

Similarly, another case cited by Judge Mayer, held that the owner of a copyrighted play, based upon the story of hypnotic influence, was not entitled to deprive others from using a like situation.†

Judge Mayer, citing authorities to sustain his position, said:

"Since both stories devolved their idea from a common source, the complainant had no case."

A motion picture play has been held to be a "writing" within the language of the Federal Constitution. In Edison v. Lubin, 122 Fed. Rep., p. 240, the Court, following the decision in a case affecting a copyrighted photograph of Oscar Wilde which Sarony, the photographer, had produced‡ so held, and in the case of the American Music Company v. Edison Manufacturing Company, 137 Fed. Rep., 265, a motion picture was held to be a writing. The Court said:

"It is a writing within the constitutional sense and the proper subject of a copyright."

The common law rights of the producer of motion picture plays, not copyrighted, was before our Court in Universal Film Mfg. Company v. Copperman. The opinion will be found in full at 218 Fed. Rep., 577. It affirmed the decision of Judge Hough in the lower court, who said:

"There was an analogy between the production of a motion picture play and a dramatic performance, and that it made no difference if the play was mechanically produced."

Quoting Judge Hough, the Court said:

"If there is no film, there is no play, and unless the film is projected upon a screen, the film is worthless. The value of the film depends entirely upon the popularity of the play."

The Circuit Court of Appeals in the same case said that the producer of a motion picture play had the common law rights of property in the intellectual conception of the sce-

*See opinion of U. S. District Court, Judge Mayer, in Vernon v. Shubert, 220 Fed. Rep., 694.
†See Bachman v. Belasco, 224 Fed. Rep., p. 815.
‡Borrow-Giles Lithographing Company v. Sarony, 111 U. S., p. 53.

nario of the play expressed in words, and the intellectual conception of the photo-play expressed in actions. Continuing, the Court said:

"When the producer sold a positive film, which was the only means of performing the play, it conferred the performing rights upon the purchaser and his assign. That no one by virtue of that sale would have acquired the right to re-enact the play and take a negative of it, or make, if that could be done, a new negative from the positive film."

The Court later said:

"That would be inconsistent with the producer's common law property in the photo-play, and that the mere performing right which it had conferred upon the owner of the film, he exercises a performing right by one or by many purchasers of positive films would be entirely consistent with the producer's common law property in the play itself."

A review of this case was denied by the Supreme Court on December 14, 1914.

A corporation may be an author of a motion picture play, and within the copyright act, section 62, the word "author" is sufficiently comprehensive to include a corporation as well as a natural person.*

WHAT MAY BE COPYRIGHTED UNDER THE COPYRIGHT ACT.

1—A Scenario.

2—The Picture.

In practice it is very common for the producer to first copyright the scenario, or story, of the plot, and then after production send the reels of pictures themselves to the copyright office for registry.

Here we might properly consider the rights of foreign authors under our copyright law, if time permitted, and the rights of the owners of dramatic plays, by license or agreement from the author as to the exhibition thereof of photo-plays. The law on this subject is not entirely clear; the conflict of decision cannot be duly reconciled and time will not permit me to do more than make a passing reference that there is such a situation.

*See Gaumont Company v. Hatch, 208 Fed. Rep., p. 381.

CENSORSHIP.

There is a movement for a National Censor, and in some States a State Censor has already been provided for. There is no more need for a censorship for a film than there is for the printing press, and if you are going to censor the one, you must certainly censor the other; and if ever the time when a censorship of either the press or the film should be an accepted and universal fact in this country, then the principles of democratic government are no longer part of our abiding faith. There has never been a censor of the theatre in this country, so that in those States in which the movement against free expression has succeeded in putting on the statute books a censor for the motion pictures, an innovation has been undertaken, which would be very splendid if it were not for the fact that in a very short time even these States will find that there is nothing for the censor to do—nothing that he would dare do—that the police power has not always been ready and able to do.

In England there has always been more or less censorship, although during the period of the most active censorship, the period of The Restoration, the plays were more immoral than at any other time. Coleman, the dramatist, acted as censor, and his plays were as immoral as the worst plays of his day.

When the photo-play came into existence, there was naturally a rush to include under the censorship any new form of entertainment or drama. As Messrs. Fowell and Palmer have pointed out in their interesting monograph on English censorship: "There was nothing that stirred the reform element so much as the thought that the English populace were enjoying themselves," and the fact that the populace had taken the cinematograph to its bosom, without reserve and with enthusiasm, was sufficient reason to the reform element to believe that there was something the matter with the cinematograph.

The first attack was made on the ground that the Sunday law was being violated, and this was followed by a charge

that inasmuch as these pictures were exhibited in the dark, darkness was an evil, as it tended to encourage sexual immorality. In fact, this was the situation in our own city and State, for in December, 1908, at a public hearing, (Mayor McClellan's report of which will be found in a volume in the Mayor's office, entitled "Hearing on Moving Picture Shows, December 23, 1908,") eminent clergymen, educators and public spirited citizens of national repute argued for the abolition of the motion picture theatre on practically the same grounds. Some of these men are now the strongest advocates of the motion picture theatre as a neighborhood center for the dissemination of education, learning and culture.

The lecturer appeared before the Mayor at that hearing, and some of the assertions I then made as to the future of this industry were regarded as extremely humorous; in fact, I stood almost alone except for the moral support of Commodore J. Stuart Blackton, of the Vitagraph Company, and we were regarded as being iconoclasts. As a result of this hearing, the Mayor cancelled the license of every motion picture theatre in the City of New York, numbering about 600, but his action was declared by the court to be arbitrary, capricious and whimsical, and his act was enjoined and restrained.*

After the Sunday objection, the attack in England was on the films themselves, and several cases were brought to court. A feature was made of the fact that boy offenders were taught to steal by seeing feats of great burglary on the cinematograph. This led to a hue and cry for a censorship, leading one cynical observer to ask the question where the other burglars of the past few thousand years had learned their business before the invention of the cinematograph. Finally a censor was appointed, Mr. G. A. Redford, and the spirit with which he undertook the job may be judged from the lists of things which, on his inauguration, he promised to keep off the films:

"No cremations.

*See Wm. Fox v. McClellan, 62 Misc., 100.

"No final, tear-compelling scenes at funerals, such as lowering the body into the grave, and so on.

"No scenes representing murder, sudden death, or suicide.

"No 'faked' representations of disasters by sea or land or air.

"No mixed bathing. No 'compromising situations.' No cock fights, no dog fights, and nothing where unnecessary cruelty is brought in, either to man or beast.

"All Biblical scenes to be watched very carefully—particularly anything from the New Testament.

"No Sovereigns, Judges, Ministers, or such high officials of the land to be treated in an unbecoming or ridiculous manner, and no living individual to be lampooned."

Naturally, in France, where the arts are understood and appreciated, one expects to find sanity in the discussion of this matter of censorship. The only restraint upon a performance at a theatre is exercised by the police authorities, who may prosecute a manager if it is considered there is anything in the play that tends to endanger public order or is inclined to be prejudicial to public morals.

In a little book by E. Kress, entitled *"Pour Ouvrir un Cinema,"* the legal formalities are explained, and there we learn that after a very acrimonious debate in the Chamber of Deputies, between M. Breton and M. G. Berry, it was decided that the motion picture would not be classed with theatrical exhibitions, and that their entire regulation came under the head of the Department of Police. In other words, instead of the motion picture, as it would have under the old law, coming under the Department of the Minister of the Interior, it was regarded as a "spectacle of curiosity," and as such simply regulated by the police code under the arret of Messidor, in the year eight of the Republic and by the Municipal Law of Paris in the year 1884, Article 97.

A state censorship existed in France up to 1908, but the only censorship that exists now is that of the police authorities, who may prosecute a manager if they consider that the photo-play may endanger public order or if prejudicial to public morals. And, incidentally, I should like to call your attention to just what is happening, i. e., that as state censorship of the theatre has lessened in popularity in Europe, and has gradually tended to abolition, the idea seems to have grown up in America that it is something this free government should take up.

LAWS OF EUROPE.

On account of the war it has not been easy to collect facts as to the laws in Europe, but I give herewith a brief synopsis of the attitude toward censorship of many European countries up to that time. For the major part of the summary I am indebted to the report of the Joint Committee of the House of Lords and the House of Commons, appointed in 1909 to investigate for Parliament the question of censorship:

Belgium: There is no state censorship of plays. The municipal authorities are responsible for the preservation of order in a theatre, and have the right to prevent a performance of any play which, in their opinion, might be likely to arouse public feeling.

Denmark: A license from the Ministry of Justice is required for the giving of theatrical performances. The license is granted on condition that the plays produced are first submitted to a censor, appointed by the Minister of Justice, from whose decision there is an appeal to the Ministry. In Copenhagen it is also the censor's duty to supervise performances at music halls, etc., and no song or other kind of entertainment, including cinematograph representations, may be given unless the censor has approved of it before productions. In the Provinces the duties of the censor, with regard to the control of the music halls, etc., are discharged by the police.

Holland: The control of theatrical and other performances is vested in the Burgomaster of every town by Article 188 of the Municipal Law of 1851. His duty is to watch against anything which is in conflict with public order and decency.

Italy: The control of theatrical and other public performances is regulated by a Statute passed in the year 1889. No public performance of any kind may be given unless the leave of the Public Security Authorities have been obtained. This department is responsible for the safety, etc., of the public in all places of entertainment. In addition to this, no

opera or stage play of any kind may be produced without the approval first obtained of the Prefect of the Province in which it is to be performed. The Prefect may withhold his consent to any performance upon the grounds of morality or public order. There is an appeal from his decision to the Minister of the Interior.

Portugal: The censorship of all public performances is vested in the Civil Governor who, in the outlying townships of his district, delegates his powers to his subordinates. In Lisbon the general powers of the Civil Governor are delegated to the Civil Police, to a branch of which body, viz., the Administrative Police, belong the censorship of theatrical performances. The head of that body is practically the censor of stage plays.

Spain: The representatives of theatrical companies must supply the Civil Governor, or the Mayor, in towns other than provisional capitols, with two copies of every dramatic work which is to be preformed for the first time. Such copies must be signed by the authors or by representatives of the company, and must be in the hands of the authorities on the same day, and at the same hour, on which the play is to be performed. When, in the opinion of the authorities, the performance of a dramatic work involves committing any offense included in the Penal Code, it is at once denounced to a competent court, to which are sent the copies of the play which have been deposited with the Civil Governor. The performance of the play is at once suspended until the decision of the Court of Justice has been given.

Sweden: There is no longer any State Censorship of plays, but anyone who wishes to give a dramatic, musical or other public performance, is obliged to notify the local police of his intention. No special permission, however, from the police authorities is usually necessary for giving dramatic or musical performances.

Saxony: A distinction is made between the Royal Theatre and the theatres under private control. In the former a censorship is exercised over stage plays by an

official called the Dramaturg; in the latter the control is in the hands of the police. The police censorship is conferred upon a high judicial officer, whose duty it is to examine every new play with regard to its moral, political or religious tendency.

Duchy of Baden: The regulations of theatres and the control over theatrical and other public performances, except in the Grand Ducal Theatre and the National Theatre at Mannheim, which are controlled by an official censor, are vested in the police, who have power to suppress any performance calculated to give offense or produce disorder.

Kingdom of Bavaria: Since February, 1808, an advisory Censorship Council has been established at Munich in connection with the Directorate of Police. This Council consists of five members, namely, an author, an artist, a linguist, a schoolmaster and a physician. The Council gives notice to the police, either verbally or in writing, when it is in doubt as to the desirability of allowing the production of any dramatic work. This system is purely local at present.

In Russia there is no censorship from the point of view of morality. The regulation of the theatre and the cinematograph is in most places under the control of what is known as the *Upravlenve po dyelam pechati*—(Regulator of Public Printing)—and this gentleman is also the regulator of the press, his business being to see that no political or religious matters are discussed on the stage or shown on the screen. As Dr. Rosenthal, a Russian authority, recently remarked: "Russia is not interested in the question of vice; the people are not yet educated enough to know much about vice; when they have achieved a higher state of civilization, then it will be necessary to regulate their morals."

In Austria, immediately after the reactionary period of 1848, censorship was decreed which permitted the censor to forbid whatever he disliked, whether it was particular words, scenes or the whole play. As the result of the prohibition of censors, noteworthy plays, as Max Halbe's *Jugend* and Gerhard Hauptmann's *Weavers* and Ernest von Wil-

denbruch's *Herinrich-drama,* were prohibited, and a strenuous movement arose in Austria against the censorship, but made practically little headway.

Interesting, because of the unusual progressive quality of all the New Zealand legislation, and doubly interesting because it is the only law that I have been able to obtain from Australia, is the New Zealand Law, which has perhaps an additional interest in that we find that it was passed on the seventh day of August, and that the only other two laws passed by the General Assembly in New Zealand on that same day was a law that related to the conduct and the part being played by New Zealand in the great European war, and a law for encouraging the fruit growing industry in New Zealand. The law is interesting in full on account of the terseness and the clarity of the language. It is entitled: "An Act to Provide for the Censoring of Cinematograph Films."

BE IT ENACTED by the General Assembly of New Zealand, in Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Cinematograph-film Censorship Act, 1916.

2. On and after the first day of October, 1916, it shall not be lawful to exhibit any cinematograph-film unless it has been approved in the manner hereinafter provided.

3. (1) There shall be appointed from time to time, by the Governor, such fit persons as the Governor deems necessary as censors of cinematograph-films, who shall hold office during the Governor's pleasure.

(2) The provisions of the Public Service Act, 1912, shall not apply to persons so appointed.

4. (1) It shall be the duty of every person so appointed to examine every cinematograph-film submitted to him for approval.

(2) Such approval shall be signified by a certificate in the prescribed form.

(3) Such approval shall not be given in the case of any film which, in the opinion of the censor, depicts any matter that is against public order and decency, or the exhibition of which for any other reason is, in the opinion of the censor, undesirable in the public interest.

(4) Such approval may be given generally, or may be given subject to a condition that the film shall be exhibited only to a specified class or classes of persons.

(5) There shall be a right of appeal from every decision of a censor under this Act to such person or persons, and in such manner and subject to such conditions, as may be prescribed by regulations under this Act.

5. A film to which any matter has been added after it has been approved by the censor shall be again submitted for approval, and until it has been been approved again, shall be deemed not to have been approved.

6. There shall be payable for every film submitted for approval under this Act such fees as are prescribed.

7. (1) Every person who exhibits any film in contravention of this Act is liable to a fine not exceeding fifty pounds, and the film may be ordered by the convicting board to be forfeited to the Crown.

(2) Any film so forfeited shall be dealt with in such manner as the Minister of Internal Affairs directs.

8. The Governor may, from time to time, by order in Council, make such regulations as he deems necessary to give effect to this Act.

In the latest edition of *"Recopil acion de Leyes Usales de la Republica Argentina* I have been unable to find any general law dealing with the moving picture industry, or the question of censorship. In the matter of South American Law, the latest reports that we have in this country, both from Chile and from Venezuela, are from 1914. Neither the *Recopilacion de Leyes y decretos of Venezuela* or Chile, up to 1914, show that there was any legislation put upon the books.

The Civil Code of Japan (the latest copy of which I have been able to find in this country is for 1909) makes naturally no mention of the cinematograph. We know historically, however, that up to the latter half of this century there was an even deeper prejudice in Japan against the theatre than there was in England, actors being regarded as outcasts and theatres as places in which no gentleman should be seen, and only as places that were fit for the lower classes. No Samurai ever entered the theatre up to the latter half of the last century, and the broadening theatre movement did not receive official sanction until 1879, when President Grant, on his visit to Japan, visited one of the leading theatres of Tokio. Naturally we can understand that there would be little desire to censor theatres when the upper class did not even go near them.

When we come to the laws of this country, it is interesting to note that only eight of the States have placed on the statute books a law that would in any way permit the film to be censored. In the State of Pennsylvania a Board of Censors has been appointed, the Board consisting of three residents and citizens of Pennsylvania, two males and one female, well qualified in education and experience to act

as censors under this Act. One male member of the Board shall be Chairman, the female member shall be Vice-chairman, and one member (male) shall be secretary. They shall be appointed by the Governor for terms of three years. Those first appointed under this Act shall be appointed for three years, two years and one year, respectively, their respective terms to be designated by the Governor.

Section 6, of the Pennsylvania Act, declares that "The Board shall examine or supervise the examination of all films, reels or views to be exhibited or used in Pennsylvania, and shall disapprove such as are sacriligious, obscene, indecent or immoral, and such as tend, in the judgment of the Board, to debase or corrupt morals. This section shall not apply to announcement or advertising slides."

In Kansas, Laws of 1913, Chapter 294, Page 504, the law states that "It shall be unlawful for any person, firm or corporation to exhibit or use any moving picture film, or reel, unless the said film, or reel, shall have been examined and approved."

It also states, Section 2, that it shall be his duty "to examine all moving picture films, or reels, intended for exhibition in this State, and approve such as he shall find to be moral and instructive, and to withhold approval from such films, or reels, as tend to debase or corrupt morals." This statute was passed upon by the United States Supreme Court and declared to be constitutional.*

In Ohio it is declared to be the duty of the Board of Censors "to examine and censor all motion picture films to be publicly exhibited in the State of Ohio * * *. Only such films as are, in the judgment and discretion of the Board of Censors, a certificate showing approval or rejection of such film shall be issued to the party submitting it. When a film is passed and approved by the Board of Censors, such film shall be given an approval number, which shall be shown on the certificate issued by the said Board of Censors to be the party submitting the film." This statute has also

*See Mutual Film Corporation v. Kansas, 236 U. S., 248.

been before the United States Supreme Court for construction on a claim of violation of constitutional rights, but the statute was held to be constitutional.*

In the other States in which there are laws, such as Michigan, Florida, Louisiana, Alabama, Massachusetts, Maine and Connecticut, the law pertains only to the sanitary and fire regulations, and looks to no more than the building operations so as to insure the safety of the patrons. In Louisiana, however, in 1914, a law was passed which permitted "any city, town or village, from and after the promulgation of this Act, through its proper legislative branch * * * * to adopt any ordinance or law for the regulation, by censorship, of moving picture theatres and shows, nickelodians, theatoriums, penny, five and ten cent arcades, and all places of amusement showing, operating or displaying motion pictures for which an admission is charged or has been made."

I made reference to two opinions in the United States Supreme Court holding that censorship laws in Kansas and Ohio were declared to be constitutional. I do not wish, however, to be understood as admitting the soundness of these decisions. On the contrary, I claim and shall presently attempt to demonstrate that they are clearly wrong in principle.

There has been introduced in Congress a bill by Mr. Hughes†, creating a Federal Board of Censors of motion pictures, the basis of which is the regulation of commodities passing through interstate channels. One of the provisions of the bill is that the censors are empowered to reject, among other things, photo-plays which have a tendency to incite crime.

Of course this provision is absolutely unnecessary. It is fully covered by both Federal and State statutes. Assuming that the picture shown is one that would incite to murder, the people who are responsible would, under both State and

*See Mutual Film Corporation v. Ohio Industrial Commission, 236 U. S., 230.
†House of Representatives Bill 456, December 6, 1915, referred to the Committee on Education.

Federal legislation, be guilty of homicide. If guilty, would you first punish them under the Federal statute by a year's imprisonment provided for in the Censorship Act and then execute them under the State statute for murder? Or would you first execute them for the murder, under the State statute, and then punish them by imprisonment under the Federal statute?

Continuing this situation, let us imagine that the State authorities first intervene, and after a conviction execute the individual, or individuals, for homicide. An interesting contest would arise as to whether the body should be turned over to the family for interment, or whether it should be surrendered to the Federal authorities for prosecution under the censorship statute, and for imprisonment if the corpse be found guilty.

Let us analyze for a moment what the legal effect of censorship on photo-plays would be. The proprietor of a newspaper in the United States, in the interest of public welfare, desires to print a cartoon of a man or group of public characters. This he may do freely, subjecting himself only to penal or civil laws of the community in which the publication is made. Under a system of censorship, assuming that the same proprietor of the newspaper is also the owner of a film producing company, or the proprietor of a motion picture theatre, if he desires to throw upon the screen exactly the same cartoon as appeared in his newspaper, he must first obtain the permission of the censor to do so.

So, too, a man or a person interested in promulgating a theory, or engaged in a propaganda that requires local advertising, may do so freely upon the mere payment of the newspaper charges. Desiring to advertise the same matter upon the screen, he must first obtain the permission of the censor to do so; and *non constat,* it may follow that although the newspaper published the printed matter, without offense against the crminal laws, or even against the civil laws of the community, the censor prohibits and inhibits the same matter from being advertised upon the screen.

I might dilate further on the subject, but I think I have done so sufficiently to establish the fact that when the last word is heard, it will be that it is unconstitutional to restrict or deprive an individual of the right of free expression.

To prevent free expression of thought, whether in the press or on the screen, would be to create a situation similar to the one which made the American Colonists rebel and led Thomas Jefferson to say: "I would rather live in a country where there are newspapers and no government than live in a country where there is government and no newspapers."

I now come to the consideration of the decision of the United States Supreme Court, reviewing the constitutionality of the statutes of Ohio and Kansas. I have said that I disagree with those decisions on principle, and I assert that censorship of motion pictures is absolutely and unqualifiedly in defiance of the spirit, and subversive of the letter of the constitution.

For aside from the question as to whether censorship is violative of the Fourteenth Amendment, it is not constitutional because there is no express provision for it in the Constitution, unless it be found in the Commerce Clause.

It is interesting, if not refreshing, to observe that the ground upon which censorship of motion pictures is urged is, that under the Commerce Clause of the Federal Constitution, power is found to regulate the shipment, sale and use of motion pictures traveling in interstate commerce. Because of this constitutional provision, it is assumed that the censorship may be exercised. This, to my mind, is straining the constitutional provision beyond all limits.

It is conceded that a censorship of the press is violative of the spirit and the letter of the Constitution. It follows that if there is an analogy between the screen and the press, as I have indicated earlier in this lecture, despite the declaration of the United States Supreme Court to the contrary, that censorship of matter, projected or portrayed upon the screen is likewise unconstitutional.

If power is to be found under the Constitution to censor motion pictures because the reels are sent in the channels of

interstate commerce, traveling from State to State, the newspapers of to-day are likewise sent through the mail from State to State, (both by mail and the express), so that if the Commerce Clause permits the censorship of films, because the reels are sent by mail or express through the States, such continuous acts would, upon the same principle, permit the establishment of a censorship over newspapers transmitted in interstate commerce.

It is very well to say that Congress has passed laws which have been declared constitutional, regulating the sale and use of food, drugs, liquors and other commodities which travel in interstate commerce, but Congress there was dealing with an article, the use or abuse of which was inherently dangerous to the life, health and well being of the community.

The motion picture reel as such, however, contains no such inherent danger. The excuse offered, (and I use the term "excuse" advisedly) is that the effect of the portrayal of a scene upon a screen may have an effect upon the mind of the spectator. But here again, if this be the effect, then the State statute, or State regulations, will condemn the quality of the picture and the offender would be subjected to prosecution under the criminal law.

The situation is not so apparent with food, drugs and liquors passing in interstate commerce, because all the States have not established pure health and pure food laws. In addition, the use of food, drugs and drink affects the physical well being of the citizen of the State and of the Nation as such. If the far-fetched argument may be used, that the physical well being of the man who is subject to call to the duty of his country, to the colors and the flag, is the ground for the legislation, it can be answered that it is not essential for a man to be high-minded morally to be a good soldier, whereas it is quite essential that he shall be physically sound for military service.

CENSORSHIP IN HISTORY.

The very form of government under which we live, that is, a democracy of a kind that has never existed anywhere else in the world, because all ancient democracies (Greek, Roman and those of the Middle Ages, etc.) were democratic only to a limited number of people. The very democracy under which we live, as I have said, grew out of the question of censorship.

During the administration of John Adams, it will be recalled that in a moment of political madness there were passed two laws, known as the Alien and Sedition Laws. The Sedition Law gave the President the power to summarily punish anyone who criticised the Government in print, and to regulate the press in so far as criticism of the Government, or any member of the administration, was concerned.

Despite the fact that back of this measure, when it was passed, was John Adams and the brains of the Federalist Party; despite the fact that at the time the Government was new and young, and the press was supposed to be particularly licentious and extreme, so widespread was the indignation that Adams was defeated for the Presidency in 1800. The Federalist Party practically passed out of existence; Thomas Jefferson became President of the United States, and the Jeffersonian Democratic Party, pledged to an uncensored press, came into control almost unanimously.

That was the only time in the history of these United States that there was ever a serious attempt to harness or censor the press, and the response of the American people was such, and so emphatic, that no one has ever again thought of making a similar attempt to violate either the letter or the spirit of the first amendment to the Constitution, which declared that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press."

In this connection I might make reference to the fact that in our own State our Legislature last year passed a law

creating a Board of Censors of motion pictures, which was vetoed by the Governor; not on the ground that it was violative of the Federal or State Constitution, but because Federal censorship was "coming anyway" and State censorship was therefore unnecessary. And this despite the fact that in our State Constitution there will be found a provision, in Section 3, which is almost similar in language to that of the Federal Constitution, the provision of the State Constitution being as follows:

"Section 3. Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press."

Now, of course, when the State Constitution speaks of giving the man the inalienable right to make and publish his sentiments on all subjects, it was never intended that if a new invention was placed upon the market for publication that it will be constitutional to prevent him from using it merely because it was new. The deaf mute, of course, cannot "speak freely," but if he is educated and is physically able he may of course "write," but the State Constitution also gives him the right to publish his sentiments on all subjects.

How can it be said that it will be constitutional to prevent him from publishing on the screen, whether he be a mute or a speaking man, that which he desires to advertise or portray or give expression to? When, mark you, our State Constitution says that "no law shall be passed to restrain or abridge the *liberty of speech* or of the press."

It is evident, of course, that the framers of the Constitution never intended that a man who could not speak freely should be deprived of a means of expression, mechanically, if you will, for that would be treating him differently from the man more favored, who is in possession of all his physical powers.

One of the most vicious features of censorship is that it vests a discretion in the censor which, like discretionary powers vested in public officers, is subject to the capricious and whimsical actions of the officials. Let me call your at-

tention to the fact that if the producer or the management, in exhibiting a photo-play, violated a penal statute and was brought to court, the defendant when arraigned in court, would be entitled to all the benefits and safeguards in the proceedings provided for in a criminal proceeding; first, the presumption of innocence; second, that the defendant must be proved guilty beyond a reasonable doubt; third, the constitutional right of a jury trial except in cases of a misdemeanor.

These essentials are, of course, not applicable upon a review of a case by a censor, and thus there is substituted, in place of well grounded principles of law, the taste and judgment of the censor. To illustrate the point further: Assuming that we had Federal censorship in this country, in addition to the censorship which obtains in the States under their statute laws, a condition of this kind would be conceivable. The censor of the State of Pennsylvania passes a picture as being fit for exhibition in his State. The moment that film is put in transit for the State of Ohio, and put on exhibition within a mile or two of the State line, the Federal censor steps in and declares that, in his opinion, the film is not a proper one to be shown.

This statement emphasizes the point that I desire to make, that the moment the Federal or State authorities undertake to determine in advance that the photo-play cannot be shown, instead of allowing it to be shown at the risk of a prosecution for violating the penal law, what really occurs is that individual taste and judgment on the part of the various censors in the various States, and of the Federal censor, is submitted in place of principles of law, which have stood as bulwarks through centuries.

I have called attention to the presumption of innocence; of the necessity for proof beyond a reasonable doubt and the right to a jury trial.

See how completely the scene shifts where censorship obtains. In the first instance the producer after being allowed to show the film is brought to trial; he may stand mute with the burden on the prosecution, and if a *prima facie*

case is made out, all the defendant need do is to create a reasonable doubt as to his guilt. However, when the censor attacks him, he is not only prevented from showing the film, but when he comes to court he must assume the burden, after having spent perhaps several hundred, or thousands, or as much as a million dollars, (as some of the recent productions have cost) of establishing that he has a good and proper film.

Even this is not sufficient, because, even though he may establish this he must go a step further. He must assume the burden of satisfying the court that the censor has acted arbitrarily, whimsically or capriciously; all of the presumptions, however, being in favor of the censor having performed his public duty honestly, faithfully and efficiently. And the defendant meets with this almost unsurmountable obstacle, that the court will unfavorably hold, as is demonstrated by actual cases in the books, that the court will not substitute its discretion for that of an officer, permitted under the law, to exercise his discretion. The court may very properly turn to counsel and say that whatever the opinion of the court may be upon the subject it cannot, in the absence of fraud or oppression, assume to exercise the duties of the official censor, for he is presumed to be an expert upon the subject, whereas the judge is not.

INDIRECT CENSORSHIP.

(I) In our own City of New York, as perhaps in other cities in our country and various places throughout the world, there has grown up an indirect censorship. The licensing board of theatres have either arbitrarily or under the guise of law, assumed the right to supervise the quality and substance of a picture that is to be shown. Thus, Mr. George H. Bell, License Commissioner of the City of New York, although under the statute having no power to censor photo-plays any more than he has the right to censor dramatic performances by living actors, compels the producers of photo-plays to submit to him, in advance of the exhibition

thereof, (although he claims it is pure "suggestion,") for his decision as to what shall or what shall not be eliminated from the photo-play as shown him.

Of course he has a method of enforcing his "suggestion" by cancelling the license of the theatre at which a photo-play is shown which he has not endorsed. For example, within the last two years a photo-play was shown at one of the largest and best known theatres in the city, dealing with a story of war conditions abroad. The License Commissioner, to whom the picture was shown in advance, refused to approve it, claiming that it violated the President's proclamation of neutrality; and this without any suggestion on the part of the Federal authorities. Accordingly, when the picture was shown at the theatre, it was claimed that the License Commissioner had threatened to revoke the license of the theatre unless the photo-play was immediately withdrawn.

Whereupon the producer of the photo-play sought relief in the Supreme Court of our city, and in an ably written opinion by Mr. Justice Whittaker,* he enjoined the License Commissioner from interfering with the photo-play, holding that it was not within his power to exercise this indirect form of censorship. Despite that decision, however, the practice of this indirect censorship still continues.

(II) There is another form of indirect censorship which is voluntarily submitted to. There is a board, known as "The National Board of Review," (formerly known as National Board of Censorship) composed of educators, public spirited citizens, clergymen, publicists, etc. This body receives from the manufacturer, in advance of the exhibition, the photo-play, and while having no power by law to censor the picture, directs and suggests eliminations, or in some cases refuses to pass a picture. Frequently you have seen upon the screen the designation "Passed by the National Board of Review," or previously, National Board of Censorship. It is to this situation that that designation has reference.

*See Life Photo Company v. Bell, 90 Misc., 469.

There can be no ground for Federal Censorship under the police power of the Federal Government, for it is extremely doubtful if the Federal Government, as such, has police power. The attempt to evade clear provisions of the statutes and constitutions of the States, up to this time, has been jealously guarded, and whenever the question has been presented as to the exercise of police power in the Federal Government, it has been stoutly resisted by the State governments.

TARIFF ACT CENSORSHIP PROVISION.

A reference to censorship is also found in the Tariff Act. In the Act of October 3, 1913, Compiled Statutes, 1913, Section 5291, Being Chapter 1638, Statutes 114, it is thus provided in Subsection 380, of Section 1, of the said Tariff Act of 1913, reference to which will be found in Webber v. Fried, (355 Fed. Rep., 355, at page 356), that a duty is imposed on photographic film positives imported for use in connection with moving pictures, or the exhibition thereof, with the provision that films so imported may be subjected to such censorship as the Secretary of the Treasury may impose, but up to this time, as was the situation when the Webber case was presented in the Federal Court, the power given to the Secretary of the Treasury has not been exercised by him, and so far as research has developed, there are no censorship regulations by the Secretary of the Treasury. This, of course, would have reference only to the importation of films, which may or may not be covered by the constitutional provisions.

SUNDAY LEGISLATION AND DECISIONS.

A statement as to the law in this State, regarding the operation of a motion picture on Sunday, is not easy.

When the motion picture theatres first appeared in this State, in 1907 and 1908, there was considerable agitation against these places being operated on Sunday. The dramatic theatres were operated under what is called "A Theatrical License," issued by the Police Commissioner, where-

as the motion picture theatres were operated under what is known as "A Common Show License," issued through the Mayor's office.

The State statute prohibited the giving of Sunday performances in theatres, of the kind defined in the statute. Of course when this law was passed, motion pictures were unknown, so that obviously this class of theatres could not come within the statute nor the charter provision which followed the statute.*

The only other section of the Penal Law which might be applicable is that pertaining to public sports and public exhibitions on Sunday.†

There is nothing in the Constitution of the State which prohibits the transaction of business on Sunday. It is our Penal Law which recognizes Sunday as a religious and a rest day, and this is covered by Section 2,140 of the Penal Law, formerly Section 259 of the Penal Code, which reads as follows:

"The first day of the week being, by general consent, set apart for rest and religious uses, the law prohibits the doing on that day of certain acts hereinafter specifically mentioned, which are serious interruptions of the repose and religious liberty of the community."

Then comes the sections declaring that Sabbath breaking is a violation of the prohibition, the punishment for Sabbath breaking, and finally, a definition of the prohibited acts on the Sabbath.

Therefore, it is to be observed, that only those things are prohibited which are specifically legislated against.

Having in mind the fact that when this section of the Penal Law was passed, motion pictures were unknown, the general language employed was not intended to cover this class of entertainment, so the attempt has at times been made to establish whether or not so much of the language as was employed, was sufficiently specific to include the motion picture theatre.

The attempt to close the motion picture theatres on Sun-

*See Section 2,152 of the Penal Law, formerly Section 277 of the Penal Code; see also Section 67 of the Greater New York Charter, as amended by the Ordinance of the Board of Aldermen, passed in 1908.

†Section 2,145 of the Penal Law, formerly Section 265 of the Penal Code.

day, resulted in the decision of the People v. Hemleb, in the Second Department of the Appellate Division,* in which Mr. Justice Gaynor, writing for the court, Judges Jenks and Woodward concurring, and Judges Hooker and Rich dissenting, held that the giving of a motion picture show was not legislated against under the statute and was therefore not illegal.

This was substantially the view of Justice Greenbaum, in Eden Musee Company v. Bingham, 58 Misc., 644, and Mr. Justice Davis, in the Supreme Court, First Department, in habeas corpus proceedings, but our Appellate Division in the First Department, in the cases of the Eden Musee Company v. Bingham, (125 App. Div., 780), Suskeind v. Bingham (125 App. Div., 787), and Keith v. Bingham (125 App. Div., 791), refused to pass directly upon the question when the matter was there presented.

Judge Pound, at Buffalo, held that it was illegal.† Judge Foote, in the Supreme Court at Rochester held that the giving of a motion picture show on Sunday was illegal. Judge Carr, at Brooklyn, held that it was legal.‡

Recently the Appellate Division of the Third Department, through four of the judges, the fifth judge dissenting, held that despite previous decisions, the giving of a motion picture show on Sunday was illegal.§

In *Hamlin, as Commissioner, versus Bender,* decided by the Appellate Division, in the Fourth Department, May 24, 1916, there is a per curiam opinion, likewise holding it illegal, the Court said: "We think no useful purpose will be served by a further discussion here of the questions so fully considered in the opinion below (92 Misc., 16). The authorities are in conflict, and the questions can only be settled by the court of last resort. We agree with the con-

*See People v. Hemleb, 137 App. Div., 356.
†See United Vaudeville Company v. Zella, 58 Misc., 16.
‡See People, etc., v. Finn, 57 Misc., page 659.
§See People of the State of New York ex rel. Leroy H. Bender, relator-respondent v. Joseph Joyce and James Keith, Chief of Police; opinion by Mr. Justice Lyon, concurred in by Judges Kellogg, Howard and Cochrane, Judge Woodward dissenting.

clusions reached by the Trial Court, and do not concur in the views which prevail in *People vs. Hemleb, 127 A. D., 356.*"

Therefore, while I am not prepared to say just what the law in our State is upon the subject, because of conflicting opinions, nevertheless it would appear that within the territorial limits of the Greater City of New York it is perfectly legal to give a motion picture show on Sunday; but when you travel forty or fifty miles north of the city line, under the recent decision of the Appellate Division of the Third Department, it is illegal. Traveling forty or fifty miles north from Albany, it is legal, but traveling the same distance northwesterly it would be illegal.

Of course our Court of Appeals has not yet given expression of its views upon the subject, but I believe that when the decision is given, it will be held that it is not illegal to give a motion picture show on Sunday.

Before the pronouncement of the Appellate Division of the Third Department, an atmosphere had been created favorable to the exhibition of motion pictures throughout the country, for the effect of the earlier decisions in this State, in 1908 and 1909, declaring the Sunday exhibitions of motion pictures to be legal, was felt throughout the entire country. Even where there had been previous ordinances, laws and decisions, declaring Sunday exhibitions illegal, these either became dead letters or were rescinded, so that it might be said that public exhibitions on Sunday are recognized as legal as a result of these earlier decisions, and this as a result of what Judge Gaynor said was the highest kind of law—public opinion.

I had prided myself on the fact that in this State I was able to have an humble part in shaping the law so that, except in a few of the rural communities, it was established that giving a motion picture show on Sunday was legal. The recent decision referred to disturbs that situation and a new argument becomes necessary. I have already referred to the fact that before the advent of motion picture theatres, and exhibitions of photo-plays therein, theatres in

this State were licensed under the "Theatrical Law" and were amenable to the then provisions of the Penal Code, Section 277, now Section 2,152. For those who are interested in the language of that statute (relating to prohibition against Sunday performances), it reads in part as follows:

"The performance of any tragedy, comedy, opera, ballet, farce, negro minstrelsy, negro or other dancing, wrestling, boxing * * * * sparring contest, trial of strength, or any part or parts therein, or any circus, equestrian, or dramatic performance or exercise, or any performance or exercise of juggling, acrobats, club performers or rope dancers, on the first day of the week is prohibited."

The Section has specific reference to a performance by living persons, or in other words, a performance of the written drama; or a performance of the stage.

The only other Section applicable therefore, if any, is that which is now known as 2145 of the Penal Law, formerly 265 of the Penal Code. That Section reads as follows:

"All shooting, hunting, fishing, playing, horse-racing, gaming, or other public sports, exercises or shows, upon the first day of the week, and all noise disturbing the peace of the day are prohibited."

This statute is derived from one of the earliest laws in the history of the State. The first enactment was on February 23, 1788, Chapter 42 of the Laws of that year, under a statute entitled "An Act for Suppressing Immorality," and it prohibited traveling, servile laboring, or working, shooting, fishing, playing, hunting or frequenting tippling houses, or any unlawful past-times by any person of the State, on the first day of the week, called Sunday. It is interesting to note that persons under the age of fourteen years were exempted from the provision of this statute, from which it might be inferred that it was perhaps legal for a youngster under fourteen to frequent a tippling house or engage in unlawful exercises or pastimes.

The penalty for violation of the statute was that the offender forfeit and pay to the use of the city, or town, the sum of six shillings. If he showed, cried, or exposed goods for sale, except small meat, milk and fish before nine o'clock in the morning, he would forfeit the goods so shown, cried or exposed, for the use of the poor of the city, or town, where the offense was committed.

It was further provided that if any person should be found shooting, fishing, playing, hunting or going to or coming from any market, or landing with cart, wagon or sled on Sunday, it should be lawful for the constable, or other citizen, to stop that person and hold him until the next day and then take him to a Justice of the Peace, to be dealt with according to the law; but there was a proviso that any person going to or returning from church, or place of worship, within the distance of twenty miles, or going to call a physician, surgeon or midwife, or carrying mail to or from a post-office or going express, by order of a public officer, should not be considered as traveling within the meaning of the Act. From which it may be inferred that a person living more than twenty miles from a church was prevented from going to church on a Sunday. If he required the services of a physician, surgeon or midwife, he could not go after one if his habitation was more than twenty miles from where a physician, surgeon or midwife resided.

This idea was probably borrowed from the old Rabbinical law, which forbids a devout Jew from traveling more than a certain distance on Sabbath, which is considerably lessened from the distance which he may travel on the Day of Atonement. So, after all, the straphanger in the subway should be happy that he did not live in 1788, amenable to the Sunday laws.

This remained the law of our State until 1813, without change and it was then adopted and went into the Revised Statutes of 1813, with the addition of the word "gaming." When the Penal Code was adopted in 1881, there was substituted for the words "or any unlawful exercises or pastimes," the phrase "or other public sports, exercises or shows." In 1883, by Chapter 358 of the Laws of that year, the word "pastimes" was omitted, so the doing of "pastimes" is not now prohibited on Sunday.

And this remained the law until the Penal Law was adopted as part of the Consolidated Laws of this State, which became a law March 12, 1909, when the exact phrase-

ology was incorporated. The language of the statute is important, particularly in view of the well-reasoned opinion of the Appellate Division of the Second Department. It established that the law, as drafted under a familiar rule of interpretation, *ejusdem generis,* that the Legislature could not have contemplated or had in mind motion picture shows, because it was not of the general character of the prohibited shows or public sports provided for in the statute.

The Appellate Division of the Third Department, however, thus disposes of the question. Says the Court: "There is but a single question to be decided on this appeal, and that is, what did the Legislature mean when it wrote in the statute, following the prohibition against shooting, hunting, fishing, playing, horse-racing, gaming, the words 'other public sports, exercises or shows'? Did it intend to prohibit exhibitions in the nature of the ordinary motion picture show? It would seem clear that the answer to that question must be in the affirmative."

This is logic that I am unable to follow. The Court declares the intentions of the Legislature to be clear, although a number of judges in this State, of practically equal and co-ordinate jurisdiction, exceeding greatly by number the four judges who concurred in the opinion that it was "clear," take an entirely different view.

Let us for a moment, therefore, analyze the situation. Now, of course, under the rule of *ejusdem generis,* it has almost invariably been held that in construing the scope of such general words as "other public sports, exercises or shows," it is necessary to consider the specific prohibitions that precede the above quoted words of general description; and where words of specific prohibition are followed by language of general description, the latter is to be considered as being co-ordinate with the particular or specific prohibition. So that, under this rule, the words "or other public sports" must be read in conjunction with the specific acts prohibited, viz.: shooting, hunting, fishing, playing, horse-racing, gaming, which, by the language of the statute, were prohibited only in public. Thus it has been logically argued

by Mr. Justice Greenbaum, in the Eden Musee case, that the intention of the Legislature was to prohibit *outdoor* exhibitions and performances which were attendant with noise and offense to the community, and therefore within the inhibition of being serious interruptions of the repose of the day, because openly and publicly conducted outdoors.

There can be no indication that the Legislature legislated against motion picture shows, for I have already shown that the language of the statute has been almost similar as far back as 1788. Coming down to more recent times, when the Code was adopted in 1881 by the Legislature, it cannot be fairly asserted that the Legislature intended in that year to prohibit the kind of performance which would first become known commercially twenty-six years in the future (1907). The Legislature could not have intended, in the language implied, that motion picture shows were to be prohibited, for however astute the legislator who drew the Act, or those voting in favor of it, their imagination, powerful as it might have been, never dreamed of motion pictures. To emphasize the point, let us recall the well-known rule: that you may not read into a penal statute by implication that which the penal statute does not in express terms prohibit. Otherwise a man would be subjecting himself to a violation of the criminal law without knowing that he was violating the law from a reading of the statute. It is for this reason that even where statutes are under review by the Court, affecting civil rights, that the Courts may look to the debates of the legislatures, or in the Congress, for the purpose of determining what the legislature intended to legislate about or against.

It is safe to assume that if there had been any debate on the adoption of the language implied in the statute, nowhere would there be found reference to the possibility of a moving picture exhibition on Sunday. You could not say that the legislation prohibiting a balloon ascension on Sunday, before the advent of aeroplanes, contemplated an inhibition of a commercial trip of an aeroplane on Sunday, many years after the enactment of the statute.

Again: When our Penal Law was made part of the Consolidated Laws of our State, in 1909, the Legislature, with full knowledge at the time that motion picture exhibitions were then openly and publicly given on Sunday, with knowledge presumed in the Legislature of the decisions of the Courts at that time, accepted the statute as it theretofore existed under the Penal Code. The Legislature was aware that the provisions of this statute were held by the highest court to be non-violative of the Sabbath Law, and it is presumed, intended to leave the law as it had been adjudicated by the court.

And this is what Judge Pound, now of our Court of Appeals, twice said in two cases before him at Special Term:

"It now seems to be established that the Penal Law of the State of New York does not prohibit the exhibition of moving pictures on Sunday; and that the municipality cannot, independent of express legislative authority, by ordinance compel and enforce Sunday closing of moving picture shows * * *; the Legislature alone may command how Sunday may be kept."*

"Seven years of inaction by the Legislature since this decision† was rendered, suggests an acceptance of the ruling by a majority of the people, or of their representatives. Among earthly powers, the Legislature alone may command how Sunday may be kept. It is the sole judge of acts to be prohibited."

It is very well for those who seek to hold that the statute is broad enough to prohibit motion picture shows on Sunday to say that if the law, as found, is wrong, relief should be had with the Legislature rather than the courts, but this is only begging the question. Since we are dealing with the Penal Law, it would be fairer if those who want Sunday opening prohibited would petition the Legislature to amend the law so that there would be an express clause, making moving pictures on Sunday illegal.

In nearly every state of the Union, where the question came before the court on the right to operate a motion picture show on Sunday, it has been held that it was not a violation of a statute similar to the one we have in our State. Thus, in the State of Texas, ex parte Lingsenfelter, 33 Amer. and Eng. Ann. Cases, 763, for having conducted a motion picture theatre in April, 1911, to which admission

*Klinger v. Ryan, 153 Supp., 937.
†People v. Rand, 154 Supp., 293.

was charged, the defendant was convicted in the lower court, but on appeal the conviction was reversed, the court saying, construing the term Penal Code, as follows:

"The exhibition of moving pictures on Sunday, and the charge of admission fee therefor, not being prohibited by Article 199 of the Penal Code, or any other Article of the Penal Code of the State of Texas, the conviction of the applicant in the Corporation Court is without authority and unlawful."

Article 199 of the Penal Code of Texas, referred to in the opinion, reads as follows:

"Article 199. Any proprietor of any place of public amusement, or the agent or employe of any such person, who shall permit his place of public amusement to be open for the purpose of public amusement on Sunday, shall be fined not less than $20, nor more than $50. The term "place of amusement" shall be construed to mean circuses, theatres, variety theatres and such other amusements as are exhibited and for which an admission fee is charged."

This statute is even broader than our own, but the Court, in applying the rule of *ejusdem generis,* said:

"What are we to understand by the general term 'and such other amusements as are exhibited * * * *'? Clearly, we think, amusements of a like or similar character. This seems to have been the construction given to similar statutes by many courts."

In the State of Idaho, under a statute almost identical with ours, it was held not to be a violation of the law to have a motion picture exhibition on Sunday.* The statute of that State reads as follows:

"It shall be unlawful for any person, or persons, to keep open on Sunday, any theatre, playhouse, dance-house, race-track, merry-go-round, circus, or show, concert, saloon, billiard or pool-room, bowling alley, variety hall or any such place of public amusement."

In the State of Montana, under a similar statute to ours, in Section 8,369 of the Revised Codes, it was held that a moving picture exhibition on Sunday was not illegal.† The defendant was convicted in a court for violation of the statute, in that he exhibited motion pictures accompanied by piano selections and vocal music. On appeal the Court said:

"The operation of a motion picture show on Sunday, in which the picture shows were of clean and moral character, were approved by a general board of censors located in another State, and were accompanied by piano selections and vocal music, is not violative of the Revised Code, Section 8,369,

*See in re Hull, 18 Idaho, 475.
†See State v. Penny, 42 Montana, 118.

making every person who on Sunday, the first day of the week, keeps open or maintains or aids in opening or maintaining any theatre, playhouse, dance-house, race-track, gambling-house, concert saloon, or variety hall, guilty of a misdemeanor."

That statute reads as follows:

"Every person who, on Sunday, the first day of the week, keeps open or maintains or aids in opening or maintaining any theatre, playhouse, dance-house, race-track, gambling-house, concert saloon or variety hall, is guilty of a misdemeanor."

It was similarly held, under the statute of the State of Mississippi, which reads as follows:

"Section 1,368. If any person shall engage in, show forth, exhibit, act, represent, perform, or cause to be shown forth, acted, represented, or performed, any interludes, farces, or plays of any kind, or any games, tricks, ball-playing of any kind, juggling, sleight of hand, or feats of dexterity, agility of body, or any bear baiting or any bull fighting, horse racing or cock fighting, or any such like show, or exhibit whatsoever on Sunday, every person so offending shall be fined not more than $50."

Adjudicated cases in Kansas and Missouri, under similar statutes, declared it not a violation of the law to give a motion picture show on Sunday. In Kansas, construing their statute, the court held in State v. Prather, 79 Kansas, 513, that playing baseball on Sunday would not violate the law. The statute in that State reads as follows:

"Every person who shall be convicted of horse-racing, cock-fighting, or playing at cards, or games of any kind, on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor and fined not exceeding fifty dollars."

In Misosuri it was similarly held, regarding a game of baseball, that it was not a violation of their statute (ex parte Joseph Neet, 157 Missouri, 527). There the Court said, construing Section 2,242 of the Revised Statutes of Missouri:

"That there was no law of the State which prevents the playing of baseball on Sunday."

The Missouri statute reads as follows:

"Every person who shall be convicted of horse-racing, cock-fighting, or playing cards or games of any kind, on the first day of the week, commonly called Sunday, shall be deemed guilty of a misdemeanor and fined not exceeding $50."

In fact, in a number of the western and southern States, there is no statutory inhibition against Sunday theatricals or Sunday moving picture exhibitions. Thus, in Arizona, the acts forbidden on Sunday do not include theatrical amusements, sports or exhibitions of any kind. All that is

prohibited on Sunday is the opening of public offices and the exercise of judicial function, and their act becomes effective as late as September, 1901.

Under the statutes of Arkansas, there is likewise no prohibition. What is there forbidden is horse-racing, cock-fighting and gambling.

In Alabama all that is forbidden on Sunday is the playing of base-ball. There seems to be no prohibition against any other form of amusement.

In Florida amusement shows, or exhibitions, are not specifically prohibited by the statute.

In the neighboring State of Connecticut, their statute legislates against concerts of music, dancing, or other public diversions on Sunday, but makes no specific reference to theatres, theatrical exhibitions or moving picture shows.

These references to the state statutes and decisions may be multiplied, but enough has been given to indicate the general tendency.

INJUNCTIONS DETERMINED THE LAW.

It is interesting to note that most of the litigation affecting this industry was determined by injunction proceedings, and it was through the agency of the special writ of injunction (which is rarely granted excepting in clearly defined cases) that relief was afforded to the person, or persons, in the industry when recourse to the courts was necessary.

This is not only interesting but is a commentary on the haste with which things are done in our day and age, particularly when affecting a new industry. It is obvious that the mere fact that there were injunction proceedings, shows that exigencies arose which required the immediate interference of the court by this extraordinary and seldom resorted to process, in order to conserve the rights of the industry or to prevent threatened ruin and destruction.

This also presents another aspect, that since these matters were largely disposed of by preliminary hearing, without the formal taking of testimony and the right to cross-

examine, the principles and doctrines have not been carefully evolved, and certainly errors must have crept in. To illustrate: In the early stages of the industry, the Sunday aspect arose, usually through attempts of the police to summarily close motion picture theatres on Sunday, so that it was necessary to rush to court for relief, with the consequent necessity for speedy decision. Since a speedy decision was required, the court necessarily was obliged to limit the argument and papers such as the exigency of the case warranted.

Another illustration: In the early stages of the industry, in our own City of New York, the then Mayor, McClellan, on the evening preceding Christmas, issued an order for the wholesale revocation of licenses of every moving picture theatre in New York, and directing that they be immediately closed, with instructions to the Police Commissioner to enforce this order. This was a big question and involved the decision as to whether the Mayor of the city had either the right or the privilege, by a stroke of the pen, to practically cripple the industry, not only affecting the theatres and the many thousands of employes engaged therein, but the producers of the pictures, whose market was found in the theatres through the exhibition of the films; also the thousands who were engaged in the manufacture of the films, as well as those manufacturing the material for the making of the pictures, the cameras and the projecting machines.

Of course there was necessity for haste. Here again the extraordinary writ of injunction was resorted to, and Mr. Justice Blackmar's decision (Fox v. McClellan supra) was that the action of the Mayor was capricious, whimsical and without legal grounds, his action rescinded and the Mayor enjoined.

Another illustration: I have referred to the acts of the so-called "Motion Picture Trust" and their claim of the right of refusing to deal in their commodity with the rental companies. Here again the question was presented by injunction, for when there was refusal to deliver their pro-

ductions to the Greater New York Film Rental Company, instantly the necessity for action arose. There was a rush to the court to enjoin the manufacturers from immediately carrying out their threat, as a result of which there stands upon the books to-day a reversal by the Circuit Court of Appeals of the decision of Judge Learned Hand, to which I have referred, and which I contend is wrong in principle, in a proceeding where no oral testimony was taken, no cross-examination of witnesses, the decision being based merely upon affidavits or papers presented upon the application for preliminary injunction.

The copyright, unfair competition and infringement aspect presents the same anomoly. Usually these matters are disposed of on informal hearing. A picture is advertised for exhibition without the consent of the person holding the copyright, who rushes into court for an application of injunction to restrain the exhibitor from using a pirated or simulated version of his story. There is no time for a deliberate hearing, and the questions involved in the case are usually disposed of by the judge after almost ex parte reading of the complainants' and defendants' papers.

Obviously, the photo-play, in States where censorship has been established, is received by the censor shortly in advance of the advertised day of its production or exhibition. The decision of the censor may be speedy or delayed as the case may be. Usually it comes within a few hours before the advertised release date. If the decision is adverse, the producers are necessarily required to hasten into court for relief by injunction. Since thousands of theatres throughout the country are waiting for the delivery of the film, and their audiences by advertisements are expecting to see it shown, there must be speedy action and speedy decision. Hence, the extraordinary writ of injunction is resorted to, with the same necessity for speedy decision and the same lack of opportunity for carefully written opinions, as I have previously pointed out.

The question may be asked as to what is the remedy for this. My answer is that if we will get away from the idea,

expressed in the opening portion of this lecture, that the legal Lilliputians shall not tie with the red-tape of legislation an industry, particularly one in its formative period without deliberate hearings and action, in a large measure these results will be avoided.

In the first place, public officials who intend to take action with respect to the Sunday proposition, should not do so except by first making application to the court with the right of hearing of the persons to be affected. In this way the opportunity is afforded to all those engaged in the industry to prepare in advance for an adverse decision and to regulate their conduct accordingly.

In the matter of copyright, unfair competition and infringement, the law may be so moulded that the person, or persons, intending to release or exhibit a photo-play, should give notice by advertising, a sufficient time in advance of his or their intention so to do; the statute further providing that within a certain stipulated number of days, application may be made to the court, by the person injured, for such relief as the situation requires; and further providing that no preliminary injunction shall be issued unless the application shall be made within the stipulated time, which should be such time in advance of the first exhibition as would give the court opportunity for careful inquiry and decision.

The other abuses, if they be such of which I complain, could similarly be regulated, either by statute or rules of court.

* * * * Naturally, such a review as we have made to-night must be cursory and even here and there disjointed. At the same time I hope that enough has been said to encourage research and study of this most fascinating subject.